

INDEX

	PAGE
Docket Entries	1a
Order to Show Cause to Adjudge Defendant in Contempt of Court	3a
Affidavit of Andrew M. Lawler, Jr. Read in Support of Motion	4a
Answer to Order to Show Cause and Affidavit of Andino Pappadio in Opposition to Motion	7a
Exhibit A Annexed to Foregoing Affidavit ..	11a
Exhibit B Annexed to Foregoing Affidavit ..	21a
Transcript of Hearing on Motion for Contempt	33a
Findings, Conclusions and Decision by Hon. William B. Herlands, D.J.	70a
Judgment and Commitment Appealed From	217a
Notice of Appeal	219a

EXHIBITS FOR GOVERNMENT

1—Grand Jury Subpoena	88a
2—Order of Judge MacMahon, dated August 4, 1964	90a
3—Affidavit of Robert M. Morgenthau with Letter Annexed	93a
4—Appearance of Andino Pappadio before Grand Jury on February 14, 1964	97a

	PAGE
5—Appearance of Andino Pappadio before Grand Jury on April 24, 1964	101a
6—Appearance of Andino Pappadio before Grand Jury on May 8, 1964	105a
7—Appearance before Judge MacMahon on August 4, 1964	110a
8—Appearance of Andino Pappadio before Grand Jury on August 4, 1964	118a
9—Appearance of Andino Pappadio before Grand Jury on October 6, 1964	127a
10—Appearance of Andino Pappadio before Grand Jury on October 8, 1964	136a
11—Appearance of Andino Pappadio before Grand Jury on October 9, 1964	170a
12—Appearance of Andino Pappadio before Grand Jury on October 13, 1964	185a

EXHIBIT FOR DEFENDANT

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit	240	240 229
Opinion, Lumbard, Ch.J.	240	240 220
Opinion concurring and in part dissenting, Medina, J.	247	240 226
Judgment	248	247 227
Petition for rehearing en banc and motion to stay the mandate (omitted in printing)	250	247 227
Order on petition for rehearing, etc.	263	248 228
Order denying petition for rehearing in banc	267	248 228
Clerk's certificate (omitted in printing)	271	249 229
Order extending time to file petition for writ of certiorari	272	249 229
Order allowing certiorari	273	250 229

Docket Entries

UNITED STATES DISTRICT COURT

(A)

64 Cr. 897

THE UNITED STATES

vs.

ANDIMO PAPPADIO

T.18 S.1406, US Code.

Contempt.

DATE

PROCEEDINGS

10-15-64 Filed affdvt & show cause order, why deft. not be held in contempt of Court. Ret. 10-28-64.
Herlands, J.

10-27-64 Filed Affidavit of Andimo Pappadio, dated 10/27/64, entitled "Answer To Order To Show Cause And Affidavit".

10-29-64 Filed deft's "Memorandum in opposition to Rule to Show Cause why Andimo Pappadio should not be adjudged in contempt of Court.

10-29-64 Hearing held on motion re: Contempt and concluded—Decision Reserved—Herlands, J.

10-30-64 Decision—Court reads findings & conclusions into the record: The Court finds the respondent Guilty of Criminal Contempt and respondent is sentenced to TWO (2) years. Application to

Docket Entries

fix bail pending appeal denied. Respondent paroled in custody of his attys pending application to U.S.C.A. to fix bail pending appeal.

Herlands, J.

10-30-64 One envelope containing following exhibits: Govt's Exh. 1 through 12 inclusive and respondent's Exh. A. ordered to remain in custody of the Clerk of the Court and to be retained in the case file. Herlands, J.

10-30-64 Deft. surrendered to U.S. Marshal to begin service of sentence. (Application before U.S.C.A. for bail pending appeal denied.)

10-30-64 Filed Judgment—TWO (2) years at a place of confinement to be designated by the Atty. Gen'l. or until further order of this Court, should ANDIMO PAPPADIO answer before the Grand Jury the questions which appear on the record as he was ordered to answer and should defendant answer those questions before the expiration of said sentence or the discharge of said Grand Jury whichever may first occur, the further order of this Court may be made terminating or modifying the sentence of imprisonment. Deft's oral motion for bail pending appeal is denied. Herlands, J.

10-30-64 Issued commitment and copies.

10-30-64 Filed notice of appeal (Copy mailed to Warden, FDH, 11-2-64).

**Order to Show Cause to Adjudge Defendant in
Contempt of Court**

(78)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

—————
In Re

ANDIMO PAPPADIO
—————

Upon the annexed affidavit of Andrew M. Lawler, Jr., Assistant U. S. Attorney, verified the 14th day of October, 1964, it is

ORDERED, that Andimo Pappadio show cause at a term of this Court to be held on the 28th day of October, 1964, at 10:00 o'clock in the forenoon of that day, in Room 318 U.S. Court House, Foley Square, New York, N. Y., or as soon thereafter as this matter may be heard, why he should not be adjudged and held in contempt of this Court.

Service of this order on the respondent or his counsel at any time prior to 4:00 P.M. on the 15th day of October, 1964, by placing the same in the mails shall be deemed sufficient.

Dated: New York, New York
October 14, 1964.

**WILLIAM B. HERLANDS
U.S.D.J.**

**Affidavit of Andrew M. Lawler, Jr. Read in
Support of Motion**

(79)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

In Re

ANDIMO PAPPADIO

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK

}ss.:

ANDREW M. LAWLER, Jr., being duly sworn, deposes and says:

1. I am an Assistant U. S. Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, assigned to the above-captioned matter, and am familiar with the facts thereof.
2. This affidavit is made in support of an application for an Order to Show Cause why Andimo Pappadio should not be held in contempt of this Court, and is made upon personal knowledge.
3. Andimo Pappadio did appear on the 14th day of February, 1964, on the 24th day of April, 1964 and on the 8th day of May, 1964 before a duly constituted grand jury of the Southern District of New York.

Affidavit of Andrew M. Lawler, Jr.

4. The grand jury was then and there inquiring into alleged violations of the laws relating to narcotics as set forth in Title 18, United States Code, Section 1406.

(80)

5. Andimo Pappadio refused to answer certain questions relating to matters under inquiry before said grand jury.

6. On August 4, 1964, upon oral and written application of the United States Attorney, Andimo Pappadio was directed by an order of the Honorable Lloyd F. MacMahon, United States District Judge, pursuant to Title 18, United States Code, Section 1406, to return to the grand jury and answer certain questions.

7. On August 4, 1964, Andimo Pappadio appeared before the said grand jury but then and there refused to answer the questions as directed.

8. On October 8th, 1964 the immunity provisions of Title 18 United States Code, Section 1406 were again explained to Andimo Pappadio in the presence of his attorney, by the Honorable William B. Herlands. Judge Herlands then directed Andimo Pappadio to return to the grand jury and testify pursuant to the immunity granted him under Section 1406.

9. On October 13, 1964 Andimo Pappadio appeared before the grand jury and refused to answer certain questions. That same morning Andimo Pappadio represented by counsel, was brought before the Honorable William B. Herlands who then and there directed the witness to answer the specific questions which he had refused to answer. (81) Thereafter that same day Andimo Pappadio again appeared

Affidavit of Andrew M. Lawler, Jr.

before the grand jury and wilfully refused to answer the questions as directed.

WHEREFORE, your deponent respectfully requests that the respondent be ordered to show cause why he should not be held in contempt of this Court.

ANDREW M. LAWLER, JR.
Assistant U. S. Attorney

Sworn to before me this
14th day of October, 1964.

**Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion**

(83)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re
ANDIMO PAPPADIO

ANDIMO PAPPADIO, being duly sworn, makes the following answer to the affidavit of Andrew M. Lawler, Jr., attached to the order to show cause why he should not be held in contempt of this Court.

- 1-4. Admits paragraph 1-4 thereof.
5. Admits paragraph 5 thereof, but avers that defendant refused to answer on the grounds of privilege.
6. It is averred that on such date, to wit, August 4, 1964, the Assistant United States Attorney applied to the Court to extend immunity to the defendant pursuant to 18 U.S.C. § 1406. On the said date, the Court, by McMahon, Jr., granted immunity pursuant to the statute aforementioned and directed the defendant to answer the questions read into the record at the said hearing on August 4, 1964, but this was not done in the presence of his attorney.
7. Admitted, but it is averred that defendant asserted his constitutional privilege.
8. Admitted, but it is further averred that on October 9, 1964, which the affidavit of the United States Attorney omits

*Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion*

to relate, the defendant returned to the Grand Jury and answered whatever questions were put to him that he (84) had been specifically directed by the Court to answer, but not all of the questions which he had been directed to answer by the Court were put to him. It is further averred that different questions were asked the defendant which he refused to answer on the ground of privilege and which he had not been specifically directed by the court to answer.

9. It is admitted that on October 13, 1964, the defendant appeared before the Grand Jury and refused to answer certain questions. It is averred, however, that the defendant refused to answer the said questions on the grounds of the First, Fifth and Sixth Amendments of the United States Constitution. The defendant further avers that the reasons he refused to answer these questions were that there is pending against him an indictment charging him with violation of the Federal Narcotics Law. A copy of the said indictment is attached hereto and marked Exhibit "A". In addition, the Assistant District Attorney has informed him that "It's been alleged" that he is a member of a particular group involved in a number of illegal activities. The defendant further avers that the Assistant District Attorney stated to him before the Grand Jury "that there was testimony that you attended a meeting" where the distribution of narcotics was discussed. The defendant attaches hereto Exhibit "B" the actual testimony in which a Government witness, Cantelopps, testified concerning him. See also *U. S. v. Aviles*, 274 F. 2d, 179, 185 (2 Cir. 1960).

Defendant states that he has been and is in consultation with attorneys, not only with respect to the instant Grand

*Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion*

Jury proceeding, but also with respect to the indictment pending against him and with respect to a possible proceeding for perjury against him even though he has truthfully answered the questions put to him by the Assistant (85) District Attorney before this Grand Jury. In connection therewith, defendant has been and is engaged in preparation for his defense, not only for the indictment outstanding against him, but for the possible proceedings for perjury against him.

To answer the questions put to him before the Grand Jury would result in the disclosure to the Government of matters of defense, as well as matters within his privilege of confidence between client and attorney. To answer such questions would result in interference with and impairment of his right to defend himself and the effective assistance of counsel.

Defendant is aware and believes that Federal and local officials are engaged in surveillance activities including mail watches and other methods of eavesdropping. Defendant fears that to answer these questions put to him will result in additional surveillance and eavesdropping with respect to his attorneys and witnesses. Defendant fears that to answer these questions put to him will substantially impair and prejudice his ability to defend himself at the trial for which he is indicted or at a trial if he is indicted for perjury.

Defendant further avers that the questions put to him are designed to destroy his fundamental rights to privacy and effective assistance of counsel and that they are not relevant or material to the inquiry for which immunity was granted to the defendant.

*Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion*

WHEREFORE, defendant prays that the order to show cause why he should not be adjudged in contempt of this Court be dismissed.

ANDIMO PAPPADIO

(86)

STATE OF NEW YORK }
COUNTY OF NEW YORK }ss.:

ANDIMO PAPPADIO, being duly sworn, deposes and says that he is the defendant herein. That he has read the order to show cause issued by this court on October 14, 1964 and the affidavit of Andrew M. Lawler, Jr., attached thereto.

That he has read the foregoing answer to order to show cause and that the facts therein stated are true and correct to the best of his knowledge, information and belief.

ANDIMO PAPPADIO

Sworn to before me this
day of October, 1964.

**Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio**

[INDICTMENT]

(87)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. Cr 156-157

UNITED STATES OF AMERICA

vs.

ALFREDO AVILES, CHARLES BARCELLONA, JOSEPH BETANCOURT, JEAN CAPECE, LUIS CANTRES, ROSARIO COLLETTI, ANTHONY COLONNA, PETER CONTES, JOAQUIN CORBO-CORDOVA, SANTIAGO DE FILLO, CHARLES DI PALERMO, JOSEPH DI PALERMO, MARY Doe, also known as Rose, meaning thereby to describe a white female of Italian extraction, approximately 28 years old, 5'4" tall, and weighing about 130 lbs., JOHN Doe, also known as JAMES LAURENSANO, meaning thereby to describe a white male, with greying black hair, weighing approximately 155 pounds and about 5'8" tall, wearing eyeglasses, NATALE EVOLA, LOUIS FIANO, CARMINE GALANTE, VINCENT GIGANTE, VITO GENOVESE, JOHN GONZALEZ, NELSON HERMIDIA, ALEXANDER LENKO, GLORIA LEON, DANIEL LESSA, NICHOLAS LESSA, BENJAMIN LEVINE, ROCCO MAZZIE, SALVATORE MARINO, JOHN ORMENTO, ANDIMO PAPPADIO, CARMINE A. POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, WILLIAM ROVIRA, JOHN RUSSO, SALVATORE SANTORA and JOSEPH VENTO,

Defendants.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

The Grand Jury charges:

1. On or about the first day of February, 1955 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, ALFREDO AVILES, CHARLES BARCELLONA, JOSEPH BETANCOURT, JEAN CAPECE, LUIS CANTRES, ROSARIO COLLETTI, ANTHONY COLONNA, PETER CONTES, JOAQUIN CORBO-CORDOVA, SANTIAGO DE FILLO, CHARLES DI PALERMO, JOSEPH DI PALERMO, MARY DOE, also known as Rose, meaning thereby to describe a white female of Italian extraction, approximately 28 years old, 5'4" tall, and weighing about 130 lbs., JOHN DOE, also known as JAMES LAURENSANO, meaning thereby to describe a white male with greying black hair, weighing approximately 155 pounds and about 5'8" tall, wearing eyeglasses, NATALE EVOLA, LOUIS FIANO, CARMINE GALANTE, VITO GENOVESE, VINCENT GIGANTE, JOHN GONZALEZ, (88) NELSON HERMIDIA, ALEXANDER LENKO, GLORIA LEON, DANIEL LESSA, NICHOLAS LESSA, BENJAMIN LEVINE, ROCCO MAZZIE, SALVATORE MARINO, JOHN ORMENTO, ANDIMO PAPPADIO, CARMINE A. POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, WILLIAM ROVIRA, JOHN RUSSO, SALVATORE SANTORA and JOSEPH VENTO, named as defendants herein, and Mario Aiello, Sandalia Curbello, Luis Diaz, Jesus Guzman-Acevedo, Victoria Guzman-Silva, Feliciano Pagan, Luis Rosa-Garcia, Gloria Sanchez, Nelson Silva, Robert Roe, also known as "Mexican", meaning thereby a white male of Spanish extraction, approximately 30 years of age, 5'10" tall, 160 pounds, black wavy hair, medium build, olive complexion with mustache; Richard Roe, also known as "Cuba", meaning thereby to describe a male of Cuban extraction, approximately 26 years old, 5'6" tall, 130

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

pounds, dark wavy hair, light brown complexion; William Doe, meaning thereby to describe a male of Cuban extraction, approximately 45 years of age, approximately 5'7" tall, dark complexion, greying hair, dark brown eyes, lean build; William Roe meaning thereby to describe a white male of Hebrew extraction, approximately 44 years of age, approximately 5'4" tall, about 155 pounds, greying brown hair, fair complexion, stocky build; and Mary Roe, meaning thereby to describe a white female, approximately 30 years of age, 5'5" tall, 125 pounds, reddish brown hair, green eyes, named as co-conspirators but not as defendants herein, and divers other persons to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, possess, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

(89)

(3) It was a part of said conspiracy that said defendants and co-conspirators would unlawfully import, smuggle, and clandestinely introduce large amounts of narcotic

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

drugs into the United States from and through Cuba, Puerto Rico, Mexico, and other countries to the Grand Jury unknown.

4. It was further a part of said conspiracy that said defendants and co-conspirators would dilute, mix, and adulterate said illegally imported narcotic drugs prior to their distribution throughout the United States.

5. It was further a part of said conspiracy that said defendants and co-conspirators would unlawfully distribute quantities of narcotic drugs, the amounts of which are to the Grand Jury unknown, throughout the United States, to wit: New York City, New York; Chicago, Illinois; Las Vegas, Nevada; Philadelphia, Pennsylvania; Cleveland, Ohio; and other cities and states of the United States to the Grand Jury unknown.

6. It was further a part of said conspiracy that the defendants and co-conspirators would misrepresent, conceal, hide and cause to be misrepresented, concealed and hidden, the purpose of the acts done in furtherance of the conspiracy.

(90)

OVERT ACTS

1. In pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1955, in the Southern District of New York, the defendants CHARLES BARCELLONA, ANTHONY COLONNA, JOSEPH DI PALERMO, and CARMINE A. POLIZZANO had a conversation in Al's Restaurant, East 4th Street, New York, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

2. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1955, the defendants LUIS FIANO and CARMINE A. POLIZZANO had a meeting in Las Vegas, Nevada.

3. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about May or June of 1955, in the Southern District of New York, the defendants JOSEPH DI PALERMO, CARMINE A. POLIZZANO and RALPH POLIZZANO had a conversation at Al's Restaurant, East 4th Street, New York, New York.

4. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August of 1955, in the Southern District of New York, the defendants CARMINE A. POLIZZANO and JOSEPH DI PALERMO had a conversation at the 21 Place Bar, 21 Second Avenue, New York, New York.

5. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August of 1955, the defendant CARMINE A. POLIZZANO traveled from New York City to Chicago, Illinois, where he met co-conspirator William Roe.

6. Further in pursuance of the said conspiracy and to effect the objects thereof, in August and September, 1955 in the Southern District of New York, the defendant DANIEL LESSA received narcotics from co-conspirator Nelson Silva in the vicinity of the Progresso Bar, Bronx, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

7. Further in pursuance of the said conspiracy and to effect the objects thereof, in August and September, 1955 in the Southern District of New York, the defendant **BENJAMIN RODRIQUEZ** received narcotics in the vicinity of the Progresso Bar, Bronx, New York.

(91)

8. Further in pursuance of the said conspiracy and to effect the objects thereof, in August and September, 1955 in the Southern District of New York, the defendant **WILLIAM ROVIRA** received narcotics at the Gallo-D'Oro Bar, Madison Avenue, New York, New York.

9. Further in pursuance of the said conspiracy and to effect the objects thereof, in October 1955, the defendants **CHARLES DI PALERMO**, **JOSEPH VENTO** and co-conspirator **Richard Roe**, had a meeting in Miami, Florida.

10. Further in pursuance of the said conspiracy and to effect the objects thereof, in November 1955, in the Southern District of New York, the defendant **BENJAMIN LEVINE** proceeded to an apartment at East 4th Street, New York City, New York.

11. Further in pursuance of the said conspiracy and to effect the objects thereof, in February 1956, in the Southern District of New York, deliveries of narcotics were made from the defendant **ROSARIO COLLETTI** to the defendant **JOHN GONZALEZ** at 793 Ninth Avenue, New York City, New York.

12. Further in pursuance of the said conspiracy and to effect the objects thereof, in June 1956, in the Southern

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

District of New York, the defendants CHARLES DI PALERMO, JOHN RUSSO, and RALPH POLIZZANO diluted narcotics in a restaurant operated by defendant ALEXANDER LENKO in New York City, New York.

13. Further in pursuance of the said conspiracy and to effect the objects thereof, in June 1956, defendant CHARLES DI PALERMO delivered a package to co-conspirator Mary Roe, in Cleveland, Ohio.

14. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, Rocco MAZZIE, NATALE EVOLA and VITO GENOVESE went to a bar at 96th Street, in New York City, New York.

15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, Rocco MAZZIE, NATALE EVOLA, SALVATORE SANTORA and co-conspirator Robert Roe had a conversation in a hotel on 85th Street, New York City, New York.

(92)

16. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendants JOHN ORMENTO, Rocco MAZZIE, and SALVATORE SANTORA had a meeting in the vicinity of 80th Street and Columbus Avenue, New York City, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

17. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, the defendant Rocco MAZZIE traveled from New York City to Philadelphia.

18. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendants VINCENT GIGANTE, JOHN ORMENTO, and VITO GENOVESE, drove on the West Side Highway, New York City, New York.

19. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendants JOHN ORMENTO, Rocco MAZZIE, and ANDIMO PAPPADIO, SALVATORE SANTORA, VITO GENOVESE, and CARMINE GALENTI had a conversation in a house on Seymour Avenue in the Borough of Bronx, City of New York.

20. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, defendant NICHOLAS LESSA received narcotics in the vicinity of 119th Street and Third Avenue in the Borough of Manhattan, City of New York.

21. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendant PETER CONTE received narcotics in the vicinity of Pleasant Avenue and 116th Street in the Borough of Manhattan, City of New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

22. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendant SANTIAGO DE FILLO was in the vicinity of 53rd Street and 8th Avenue, New York City, New York.

23. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about September 1956, in the Southern District of New York, the defendants JOSEPH DI PALERMO, JOAQUIN CORBO-CORDOVA, and co-conspirator Richard Roe had a conversation (93) in the vicinity of 44th Street and 8th Avenue, New York City, New York.

24. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about October 1956, in the Southern District of New York, the defendants JOSEPH BETANCOURT, NELSON HERMIDA, and GLORIA LEON had a meeting in an apartment at Columbus Avenue in New York City, New York.

25. Further in pursuance of said conspiracy and to effect the objects thereof, in or about October 1956, in the Southern District of New York, the defendant MARY DOE delivered narcotics in the vicinity of 117th Street and Third Avenue, New York City, New York.

26. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about March 1957, in the Southern District of New York, the defendants RALPH POLIZZANO, ALFRED AVILES and SALVATORE MARINO had a conversation in the vicinity of 205 Eldridge Street, New York City, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

27. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about March 1957, in the Southern District of New York, the defendant RALPH POLIZZANO paid a sum of money to the defendant JEAN CAPECE in a bar on East 4th Street, New York City, New York.

28. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about May 1957, in the Southern District of New York, the defendant LUIS CANTRES delivered narcotics in the Gallo D'Oro Bar, Madison Avenue, New York City, New York.

(Title 21, United States Code, Sections 173 and 174).

PAUL W. WILLIAMS
United States Attorney

ABBOT COPELAND
Foreman

**Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio**

(94)

342a

Nelson Silva Cantellops—for Government—Direct

Mr. Christy: Your Honor—

The Court: Objection overruled.

A. Chin and Vito Genovese.

Q. Was anybody else in the car? (1302) A. No; Ormento and myself.

Q. Now you were on the West Side Highway? A. Yes.

Q. Now where did you go, do you recall? A. I don't recall the place, I don't know the name of it.

Q. Did you go some place? A. We went to some house, to a house.

Q. Mr. Cantellops, I show you Government's Exhibit 34 for identification and I ask you if that is an accurate likeness of some place that you have been before? A. Yes.

Q. What is that place? A. That is the house where we went, to that place.

Q. Is that a reproduction or an accurate likeness of the place that you drove to that night? A. That is the house, like that. That's where we went. That's exactly a reproduction of the house we went that night.

Q. What happened when you got to the house? A. The occupants of the first car all went in (1303) and Ormento and I from the second car went in except Mr. Vito and Chin.

Q. You and Ormento went into the house, is that right? A. Yes.

Q. Was there anybody in the house? A. Was Rocco Mazzie and other people there.

Q. Did you know any of the other people there? A. No, I don't know them.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

Q. Now what happened?

Mr. M. Stim: May we have the time of the day, your Honor.

(95)

343a

Nelson Silva Cantellops—for Government—Direct

Q. Do you recall approximately the time of the day? A. It was at night. It was already about 11 o'clock at night. It was late at night.

Mr. M. Stim: 11 o'clock at night.

The Court: That is what he said.

Q. Who else went into the house if you can recall? A. Ormento, Pappadio, Evola and Galante and myself.

Q. And Rocco Mazzie was in the house; is that correct? A. Yes.

(1304) Q. What happened when you got into the house? A. There was a blanket on the floor and a pair of dice.

Q. What happened? A. It look like a crap game but that was to simulate a crap game, and everybody sat around on chairs.

Mr. Chapman: I move to strike out what it was to simulate.

The Court: Did he say simulate?

Mr. Chapman: He said that it was to simulate a crap game.

Mr. Christy: That was his observation, your Honor.

The Court: Tell us what the facts were. Describe what there was.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

The Witness: Well, there was no crap game but there was crap there, a pair of dice there.

Q. Was there some conversation? A. Yes.

Q. And would you tell us as best you can recall what was said in this conversation and by whom? A. The conversation was started by Ormento, and it was about sealing of the territory in the Bronx.

(96)

344a

Nelson Silva Cantellops—for Government—Direct

(1305) Mr. Edelbaum: Now, your Honor, that is a conclusion. I think we are entitled to have what the witness says that the man said, and I move to strike out the answer.

Mr. Christy: Your Honor, I think that it was responsive. He is saying what Ormento said.

The Court: The motion is granted.

Mr. Witness, try to use the exact language to the extent that you can recall and give us the person that you say used the language.

Q. Will you tell us as best you can recall what Ormento said? A. He was saying about sealing this territory and using it for the narcotics business.

Q. Was there a discussion about how the territory was going to be sealed?

Mr. M. Stim: I object to leading questions of this character. It is quite obvious—

The Court: Objection overruled.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

A. The conversation went about the territory to be taken over, was the Spanish market, a big Spanish market in the Bronx, the Longwood area.

Q. In what area? A. The Longwood area and Fox Street, around that (1306) area. The main purpose was to get rid of the pushers at that time in that area.

Mr. Edelbaum: Your Honor, I object to that and move to strike it out.

The Court: Motion granted.

Tell us what was said.

The Witness: That is what was said. I am saying what was said.

(97)

345a

Nelson Silva Cantellops—for Government—Direct

Q. Will you continue and just tell us as best you can recall? A. It was said all the pushers in that area have to be taken out, plus a few banks and numbers have to be taken in because was to be sealed as they used to do; in other words, they buy a small policy number and push out—

Mr. M. Stim: I move to strike, your Honor, his observation or his explanation of "in other words." This is not conversation.

Q. Is that what was said? A. It was what was said.

(1307) Q. Will you continue. The area is comprised of most Spanish people. The bank numbers was no problem but the problem was too much narcotics pushers.

Mr. Edelbaum: I object to "the bank numbers was no problem." Is he saying that somebody said this,

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

and if he is, who said it? We are entitled to know that. Is he relating a conversation or is he giving us a conclusion?

The Court: The object is to get a conversation, Mr. Witness. Give us the conversation as far as you can.

The Witness: I said that. I am giving the conversation, what was said.

Q. Who said this? A. Ormento said it.

Q. Now will you continue.

The Court: What did Ormento say?

The Witness: He say that as far as numbers is concerned it was not too much a problem, but there was a big problem because there were too many pushers.

(98)

346a

Nelson Silva Cantellops—for Government—Direct

Q. And what else was said as best you can recall? A. The discussion took—turn to how long it (1308) will take to clear the area and whose method should be used.

Q. Who said what about this, if you can recall? A. It was said by Ormento, and everybody took part in the argument.

Mr. M. Stim: May we have who the "everybody" is, please?

Mr. Christy: Your Honor, I believe he has testified as to who the persons were who were present at this meeting.

The Court: Next question.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

Q. Did everybody there participate in the conversation?
A. Everybody there.

Q. Now will you tell us what was said about the length of time? A. After about half an hour—not half an hour, I would say about 15 minutes or five minutes, they agree. They agree and disagree on the time—

Mr. M. Stim: I object to "agree" as a conclusion. Let him give us the conversation.

The Court: If you will give the witness an opportunity to you will get the conversation.

Will you please continue with your recital (1309) of what you heard said and by whom.

The Witness: After discussion of the pros and cons of the situation, they decided that the time to seal the place that was needed was at least a month and a half.

The Court: Who decided that and who said anything that make you feel that that was a decision

(99)

347a

Nelson Silva Cantellops—for Government—Direct

or from which you draw that conclusion, because to the extent that it is a conclusion it is to be stricken. If anybody said that, that is what we want to get.

The Witness: Evola and Pappadio agree—they agree on that time, and then everybody went along with him.

* * * * *

(1310) The Court: * * *

Mr. Witness, you used the word "decide." Did anybody say, "I decide this"?

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

The Witness: Well, they propose and that was accepted—

Mr. Edelbaum: I move to strike that out.

The Court: Motion granted.

(1311) Tell us who said what?

The Witness: Evola and Pappadio mentioned that will take a month. Everybody accept that decision, a month and a half, a month—or a month and a half.

By Mr. Christy:

Q. A month and a half or a month to do what? A. To clear the territory.

Q. What was said about clearing the territory and by whom? A. They first gave the matter of the time; they settled the time by getting an accord that it will take a month or a month and a half.

Mr. Edelbaum: I move to strike out that they settled and reached an accord. That is a conclusion, your Honor.

The Court: Motion granted.

(100)

348a

Nelson Silva Cantellops—for Government—Direct

Q. After this, what was said about sealing the territory, the purpose of sealing the territory; what was said and by whom?

Mr. Edelbaum: I object to that, if your Honor pleases, as leading.

The Court: Objection overruled.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

A. The main purpose of the meeting was to take over this territory and bring new people in to distribute (1312) the narcotics business.

Mr. Edelbarm: I move to strike it out.

The Court: Motion granted.

Q. Did anybody say that?

The Court: Ladies and gentlemen, I do not have to repeat this everytime a motion is granted to strike any evidence or any testimony. What is stricken is to be completely disregarded by you as if it was never uttered and as if you never heard it. That is the purpose of striking it.

Q. What was said about the purpose and by whom? A. The purpose was to sell narcotics and the number banks to protect the narcotics business.

Q. Who said that?

Mr. Edelbaum: Just a moment.

A. I can't explain all the words—

• • • • •

(101)

349a

Nelson Silva Cantellops—for Government—Direct

(1313) Q. Who at this meeting said anything about the purpose, if you recall? A. John Ormento, Evola and Pappadio.

Q. Will you tell us what they said about the purpose as best you can recall? A. Well, the conversation went in this way: What are we going to do about this place? It

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

went further, the conversation, to the point where time came to be an important factor. Time was set, one month or a month and a half to clear the place. Then they reach another point of the matter, the method to be used to clear this place, the obstructions, and different manual details that have to be taken care of.

The Court: Who mentioned the method and who mentioned the time?

The Witness: It was mentioned among all.

The Court: What?

The Witness: It was mentioned among all; everybody took part in the conversation.

Mr. Edelbaum: I move to strike his whole answer, the answer that preceded the last one to your Honor's question.

(1314) Mr. Christy: Your Honor—

The Court: Objection overruled. You may proceed, Mr. Christy.

Q. What was said about the purpose, what was to be done? A. The purpose was to take over that market over there.

Mr. Edelbaum: I move to strike it out, your Honor.

The Court: Objection overruled.

Did anybody say that at that meeting?

The Witness: Yes.

Nelson Silva Cantellops—for Government—Direct

The Court: Who said it?

The Witness: Ormento.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

Q. And after the market was taken over what was to be done? A. Then operate the organization of the territory.

Q. Who said that? A. Ormento.

Q. What were they going to operate? A. They will operate both businesses, numbers and narcotics.

Q. And who said that? A. Ormento.

(1315) Mr. Edelbaum: Now, your Honor, I call for the withdrawal of a juror and the declaration of a mistrial on the ground that the witness has testified to some other charges not contained in this indictment.

The Court: Motion denied.

Mr. Edelbaum: Exception.

Q. How long did this conversation take or how much time was consumed in this conversation? A. From 20 to 30 minutes.

Q. And what happened then? A. At the end of the conversation, at the end of the meeting, Genovese came in.

Q. What happened when he came in? A. He ask what was the decision, what was the decision in the plan, what they had in mind. Everybody spoke his part and the time and details, and he say that he wanted to know because he wanted to know when to send his men in.

Q. Who said that? A. Mr. Genovese.

Q. Was there anything else said while he was there? A. No. Only Pappadio said that he had a cousin that could do a good job because he was good at that.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

(1316) The Witness: A cousin.

Q. Was anything else said that you can recall? A. As far as I recall, I don't recall.

Q. Was there any discussion about what part you were to play? A. That was discussed too but that was discussed after the meeting while we were driving off.

Q. And what was said about that?

Mr. M. Stim: May we have a time on that?

The Court: And by whom.

Q. Did you leave this home? A. Yes.

Q. And what happened when you left? A. We drove back to New York.

Q. Who is "we"? A. Evola, Ormento, Pappadio, Galente and myself.

Q. And what about Genovese and Gigante? A. They went away in their own car.

Q. On the way back was there a conversation? A. Yes, sir.

Q. And what was said and by whom? A. Ormento told me that after things were more clear, more clean in the place, I will be planted there as a contact man.

(1317) Q. For what? A. For the narcotic traffic.

Q. Was anything else said about your role? A. That is what I was supposed to be, the distributor; in other words, the contact man and distributor of the setup.

Q. Before you were to do this were you to do anything else? Was anything said about what you were to do? A. No. In other words, I was to do before I could take over, before I go, was to go around and check every pusher, every

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

(104)

352a

Nelson Silva Cantellops—for Government—Direct
connection and how they operate and what could be done
to get rid of them.

* * * * *

(1318) Q. At the recess, Mr. Cantellops, you were telling us about a conversation that you had in the car on the way down.

. After this conversation did you have occasion to go back to that area? A. Later on, yes.

Q. And when was that, as best you can recall? A. The early part of September.

Q. What did you do up there? A. I make a delivery over there.

Q. Prior to the delivery did you have a conversation with anybody? A. I saw John Ormento there.

Q. What did he say to you? A. He told me that I have to take the stuff to Fox Street, 950, some place on Fox Street. I was told where to pick and where to go.

Q. What did he tell you about picking up the stuff? (1319) A. I pick in the same neighborhood of Washington Heights.

Q. What did he tell you about the delivery? A. I went to a direct address at that time, to an apartment there.

The Court: An apartment where?

The Witness: In Fox Street, if I recall, 958 or 956 Fox Street.

Q. In the Bronx is it? A. Yes.

Q. After this conversation with Ormento what did you do? A. I did as he told me and make the delivery and I went to that place.

Transcript of Hearing on Motion for Contempt

(1)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

64 Cr. 897

[SAME TITLE]

Before:

HON. WILLIAM B. HERLANDS,

District Judge.

New York, N. Y.,
October 28, 1964,
11:05 a.m.

Appearances:

ROBERT M. MORGENTHAU, Esq.,

United States Attorney,
For the Government;

WILLIAM M. TENDY, Esq. and

ANDREW M. LAWLER, Esq.,
Assistant United States Attorneys.

LAURITANO, SCHLACTER & SCHNEIDER, Esqs.,

Attorneys for Defendant;

JACOB KOSSMAN, Esq. and

PHILIP R. EDELBAUM, Esq., of Counsel.

Transcript of Hearing on Motion for Contempt

(2)

The Court: The Court will now proceed with the contempt matter. The further call of the calendar will be held in abeyance.

Are both sides ready?

Mr. Lawler: The Government is ready, your Honor.

The Court: All right.

Mr. Kossman: If the Court please, I would like the record to show that we would like to be tried in this case by a jury.

The Court: On what ground?

Mr. Kossman: Well, on the ground that a person under the Fifth Amendment is entitled to a trial by jury, and we say that that extends to and encompasses even a criminal contempt.

Mr. Lawler: Your Honor, the Government's position is that under the holding of United States vs. Barnett that the defendant is not entitled as of right to a trial by jury. This is a contempt hearing brought on by an order to show cause under Section 42 (b)—Rule 42 (b) of the Rules of Criminal Procedure, and as such should be heard by your Honor with a jury.

The Court: In United States vs. Barnett, 376 U. S. 681, the Court was divided on the issue there presented (3) and I presume that Mr. Kossman desires to make a record here so as to preserve for appellate review the issue of whether or not a criminal contempt of this kind and character, plus such punishment as may possibly be imposed, in view of the reasoning of some of the Judges in the Barnett case, might present an issue that should be resolved in favor of the defendant.

Mr. Kossman: That is right.

The Court: Whether here or in some other court.

Transcript of Hearing on Motion for Contempt

Mr. Kossman: That is right.

The Court: It is noted. I feel that in light of the law at the present time I am constrained to deny the application of Mr. Kossman for a trial by jury.

Mr. Lawler: Your Honor, might we have the witness sitting at the second table, please?

The Court: The record will show that Andimo Pappadio is now seated at the table with his counsel.

Mr. Lawler: Your Honor, if I might make a brief preliminary statement.

The Court: All right, proceed.

Mr. Lawler: Your Honor, this is a hearing which was brought on by an order to show cause signed by your Honor. The order to show cause which set up this (4) hearing was for the purpose of determining why the witness Andimo Pappadio should not be held in contempt for his refusal to answer certain questions before the grand jury on October 13th of this year.

The background, very briefly, your Honor, is that the witness appeared on three separate occasions in the early part of 1964 before a federal grand jury which was then inquiring into alleged violations of the Federal Narcotic laws.

On August 4th an application was made by the United States Attorney to have the witness Andimo Pappadio granted immunity pursuant to the provisions of Title 18, Section 1406. On August 4th the matter was heard before Judge MacMahon in Room 318.

At that time Judge MacMahon stated that all the provisions of Section 1406 had been complied with, and he ordered the witness Andimo Pappadio to answer certain questions, after explaining to him that he had been granted full and complete immunity.

Transcript of Hearing on Motion for Contempt

Thereafter Andimo Pappadio returned on August 4th and refused to answer the questions as directed. He again appeared on October 6th and again refused to answer questions as directed. On October 8th he was brought before your Honor in this courtroom, at which time your Honor (5) again explained to him that he had been granted full and complete immunity and that he was required to answer questions as directed. Thereafter on October 9th the witness appeared before the grand jury and answered certain questions.

On October 13th he was again brought before the grand jury to answer certain specific questions and he refused to answer those questions. He was brought before your Honor and your Honor asked or directed him to answer those questions.

Again that same afternoon he was brought back before the grand jury and again he refused to answer those questions.

The position of the Government is that the witness Andimo Pappadio is in contempt of an order of this Court in his refusal or for his refusal to answer the questions on October 13th.

That very briefly is the background of this case, and the Government is prepared to go ahead with its proof at this time.

The Court: Without going into any details but simply for the purpose of sharpening the focus, how many questions are involved?

(6)

Mr. Lawler: I believe there are five questions, your Honor.

The Court: Five specific questions that you say he refused to answer?

Transcript of Hearing on Motion for Contempt

Mr. Lawler: On October 13th.

The Court: And the refusal to answer those five specific questions are the predicate for this instant proceeding?

Mr. Lawler: That is correct, your Honor.

The Court: Would you want to make an opening statement, Mr. Kossman?

Mr. Kossman: Well, if the Court pleases—

The Court: It would be helpful to me if you did.

Mr. Kossman: If it is your Honor's wish I will make an opening statement.

The Court: It is not a direction.

Mr. Kossman: I appreciate that. If the Court please, this is a most unusual contempt proceeding. It is not the ordinary type of contempt proceeding. After he was ordered to answer by the Court—I don't know, forty or fifty questions—and then we had argument before your Honor, and your Honor ordered him to answer the questions, he was willing—and I would like to call your (7) Honor's attention to the fact that as of now, although the district attorney was kind enough to show me the original transcript of testimony before the grand jury, I still don't have it, so the exact words in terms of the questions and the exact words in terms of the answers, I cannot quote verbatim—but he was willing to answer every single question of the original order for which the Government sought to give him immunity, and which the Judge explained to him—the Court at that time was Judge MacMahon; and after your Honor overruled the various objections that were made on the ground of relevancy and others, he was willing to answer every single one of those questions.

Now, when he came back on October 8th—when he came back to have him before your Honor, and agreed to, the Government said—

Transcript of Hearing on Motion for Contempt

The Court: You are not clear in the last statement you made. You said October 8th—

Mr. Kossman: After October 8th, when he agreed to answer all the questions that two Courts had already directed him to answer, he came back to the grand jury on October 9th, on Friday. That is not in the Government's affidavit. I mean October 9th, through inadvertence, (8) was eliminated; there is just a slight error.

So he came back on October 9th, and they began to ask certain questions that he had been ordered to—"Are you in the narcotic business?"—of course, I say I have to go vaguely because I don't have the questions in front of me—and he answered, "No."

"Are you a member of this group?" He said, "No."

There were forty or fifty questions, and I represent to your Honor that he was prepared to answer every single one of them.

Now, they then went into a new series of questions, and these are the four or five questions which are before your Honor, and I submit that these questions—I mean, with all respect to the Government and the good faith they have in presenting a case before the Court—I submit that in my, well, thirty years experience I have seen a lot of contempt cases, but I have never seen a contempt case come up on these four or five questions, from the very nature of it.

The Court: Just a minute, Mr. Kossman, because I want to understand you. Assuming there are five questions, is it admitted that your client did not answer them?

(9)

Mr. Kossman: It is admitted—he answered them by—which is not made clear by the Government's affidavit—he took the First Amendment, he took the Fifth Amend-

Transcript of Hearing on Motion for Contempt

ment, and he took the Sixth Amendment, and we have filed an answer—

The Court: In other words, he answered them by claiming certain constitutional privileges?

Mr. Kossman: That's correct, and this is the difference between this case and—

The Court: Just wait a minute. We will get it all, because it is a very simple situation.

Mr. Kossman: All right.

The Court: There are five questions that he declined to answer on the ground that he had certain constitutional privileges?

Mr. Kossman: That's correct.

The Court: Which were stated on the record?

Mr. Kossman: It may be that there are only four questions. I discussed with Mr. Lawler that one of the last questions he may have asked, like, "How many meetings were there?", and the defendant, because he is a defendant in this case, he is no longer a witness—the defendant believes that he did answer somewhere, (10) and again, as I say, and it is not the fault of the district attorney—

The Court: Leaving out matters of protocol and getting down to the facts, whether it is four questions or five questions will be developed.

Mr. Kossman: Yes.

The Court: But whatever it is, your client declined to answer on the ground that he had a right not to answer because of constitutional privileges that he asserted; is that right?

Mr. Kossman: That's correct.

The Court: Is it your contention that he has the privilege, or is it your contention that there is some procedural flaw in that the questions that are the predicate of this

Transcript of Hearing on Motion for Contempt

proceeding were questions which were not brought before the Court and explained to this defendant by the exposition of Section 1406, Title 18?

Mr. Kossman: No, I don't—

The Court: Because in the chronology of the proceeding you have created the impression, at least in my mind, that whereas a number of questions had been the subject of explanation by Judge McMahon and myself, and the impact of Section 1406 was explained to the defendant, (11) and that the defendant answered those questions, that what happened was that the prosecution or Government then proceeded to ask new questions, or as you put it, a new series of questions.

Are you claiming that the new series of questions, assuming they were a new series, were not encompassed within any of the instructions given by Judge MacMahon and by me?

Mr. Kossman: Well, obviously they were not encompassed by the instructions given by Judge MacMahon, because—

The Court: What about my instructions?

Mr. Kossman: —but they are encompassed by your instructions.

The Court: Let us put aside some of the possible contentions. You are not claiming that these questions are new questions in the sense that he had never been instructed by the Court to answer them?

Mr. Kossman: That is correct, but I am claiming, as long as we are talking procedure, that when the Government—

The Court: Will you answer my question: you are not claiming that your client was not given the (12) appropriate instructions to answer?

Transcript of Hearing on Motion for Contempt

Mr. Kossman: That's correct.

The Court: All right. What are you claiming as your contention?

Mr. Kossman: From a procedural standpoint?

The Court: From any standpoint. I just want to know what your argument is, without characterizing it.

Mr. Kossman: We filed an answer—I don't know if it is before your Honor. We filed that yesterday and we served a copy.

The Court: For purposes of an opening statement, you tell me what you are claiming.

Mr. Kossman: Here is what we are claiming: that when the Government originally asked permission from the Attorney General, according to the statute, that it was in the public interest that he be ordered to answer certain questions, and they must have—I say, must have—I mean, they must have notified the Attorney General that these are the questions we asked him, because the answer comes back that in all probability he was going to plead the Fifth Amendment and plead privilege, and so on and so forth, and we therefore authorize you for a grant of immunity, we say this: that these questions, these four (13) questions were never, or five questions, were never presented to the Attorney General's office, and--

The Court: You claim that that is a fatal defect; is that right?

Mr. Kossman: I say that is a defect in the sense that the original grant of immunity, which has to be in a certain sense strictly construed against the Government, and strictly construed in the sense of trying to—

The Court: Mr. Kossman, without going into all the details because there will be time for that, your contention is that these four or five questions were not encompassed

Transcript of Hearing on Motion for Contempt

within the letter or direction or authority of the Attorney General, which is a condition precedent to the conferring of immunity under Section 1406.

Mr. Kossman: That is correct.

The Court: And consequently, with regard to these four or five questions, the Government was not in a position to ask the Court to confer immunity on this defendant because there is lacking one of the steps that the statute requires.

Mr. Kossman: That is correct.

The Court: Is that what it is?

(14)

Mr. Kossman: That is one of the contentions.

The Court: What is the second contention?

Mr. Kossman: The other contentions are these: He has an indictment—when I say "he" I mean the defendant.

The Court: You mean the outstanding indictment?

Mr. Kossman: Yes. Now, a grant of immunity, all the cases hold, doesn't wash out that indictment. That indictment is there. The grant of immunity is a defense.

Now, it seems that an indictment that has been outstanding six and a half years, that the Government certainly doesn't have the desire to drop that indictment, because if it did drop the indictment, it certainly would influence the defendant in answering some of these particular questions.

The Court: You claim that notwithstanding the comprehensive grant of immunity contained in Section 1406, the fact that there is an indictment pending creates such a situation that the defendant is justified in refusing to answer these questions.

Mr. Kossman: Especially these questions because—

The Court: Because they relate to his defense.

Transcript of Hearing on Motion for Contempt

(15)

Mr. Kossman: Because they relate not only to his defense but preparation for defense and consultation with attorneys and with witnesses, and, therefore, since there is outstanding this particular indictment, and perhaps the Government may take the position that he never gave them any evidence, even though they gave him immunity, and therefore they want to proceed with that particular indictment, he has a right to go around and see people.

This is the most unusual—

The Court: All right. What is the third contention?

Mr. Kossman: The next one, the thrust is this: The assistant district attorney, in fairness—I mean it is really fair—stated to the defendant, at that time the witness, "that there was testimony that I attended a meeting" where the distribution of narcotics was discussed.

The assistant district attorney also stated, "it has been alleged" that I am a member of a particular group involved in a number of illegal activities.

Now, the defendant, at that time the witness, told the grand jury that he was not a member of the group, and he didn't attend any meetings where the distribution of narcotics was discussed.

This is a terrible situation, and I will tell (16) you why and how he is squeezed. Here is an individual, if he kept silent, if he refused to say anything, the most that could happen—I don't know what the status of the law is—I mean, is a year, six months, two years or eighteen months for contempt.

By answering—and he did know the penalties; I explained the penalties to him—by answering he subjects himself to prosecution for perjury for which he can get

Transcript of Hearing on Motion for Contempt

five years. Since there is a couple of them, he can get ten or fifteen years, forgetting now about the narcotics thing.

The Government says, "We have witnesses that say that you are involved in a group. We have witnesses, so to speak, that you sold narcotics." He says, "That is not so; that is a lie."

Now, under those circumstances, your Honor, he must prepare for a pending perjury indictment. Someone is committing perjury.

Now, we have attached the testimony of the Cantellops case—that is six and a half years ago—where Cantellops says that the defendant was present there. And this is the point involved: the immunity statute does not give you immunity for perjury. The only thing (17) immunity gives you is protection against the Fifth Amendment. It doesn't give you protection against the Sixth Amendment. It doesn't give you protection against perjury.

And, therefore, in the circumstances of the case—in other words, this is not just someone coming up and saying, "I refuse to answer this question because I will be guilty of perjury," because he will say, "Where is the showing?"

Now, we have made the showing by analogy with the Fifth Amendment cases, where Judge Learned Hand in *United States vs. Weissman*—I think it is 111 or 112 Fed. 2d—said that you have to push the door open a little bit, ajar, in order to show that there is a basis for claiming the privilege.

By analogy we not only pushed the door open; we have knocked the door down.

The Court: Your first contention then is that while ordinarily an immunity statute is perfectly proper if it grants immunity against prosecution, and the use of testimony and any acts or transactions disclosed by such testimony,

Transcript of Hearing on Motion for Contempt

except for perjury committed in the course of the testimony, that in this particular case this represents (18) an exception to that rule in that you have made a showing which indicates that there is a clear and present danger that this defendant is in the process of being the target of a perjury prosecution, and that he therefore has a right to claim his privilege with respect to a possible prosecution for perjury growing out of the testimony which is the subject matter of this grand jury investigation.

Is that your contention?

Mr. Kossman: That is one of the contentions. The other contention is that he therefore has a right to prepare to meet that, and that takes in the Sixth Amendment; I mean the right of meeting witnesses and meeting lawyers and preparing his defense. He does not have to disclose to the Government the witnesses that he sees in order to show that it is the Government people that committed perjury.

The Court: In other words, you claim that while ordinarily an immunity statute can except perjury committed in the course of the testimony elicited pursuant to the immunity statute, that where there is a perjury case in the process of being made, ostensibly, that a whole constellation of rights are generated in favor of (19) the defendant vis-a-vis that potential perjury case?

Mr. Kossman: That is correct.

The Court: All right, I don't want to take up time with legal arguments at this time. Are those your major contentions?

Mr. Kossman: Of course, the next proposition is this—I will say two more but I will make it very brief. The question is about the relevancy.

Now, I have cited that in Brown vs. United States—

The Court: In other words, you claim that the questions

Transcript of Hearing on Motion for Contempt

were not material or relevant to the grand jury investigation.

Mr. Kossman: So much so that they did not even bear a reasonable relationship.

The Court: All right, we will come to that. I just want to get your contention.

Mr. Kossman: And then, of course, the question of interference with lawyers. We say, from the type of questions the Government has no right—and he is a defendant in a criminal case—the Government has no right to survey a defendant. They have been raising it in various cases, that they don't survey defendants, they only survey other people. The defendants accidentally (20) happen to be present.

The Court: What do you mean by "survey"?

Mr. Kossman: We say that they have no right to survey a defendant and try to interfere with his defense while he is preparing for a defense, and the Government—

The Court: I just wanted to get your contentions.

Mr. Kossman: Now, if they have the right to survey—

The Court: I will hear your argument at the end of the evidence.

Mr. Kossman: Thank you.

Mr. Lawler: Shall we go ahead with our evidence at this time, your Honor?

The Court: Go ahead.

Mr. Lawler: Your Honor, what has been marked Government's Exhibit 1 for Identification is a copy of a grand jury subpoena. I believe Mr. Kossman will stipulate that this subpoena was served on the defendant Andimo Pappadio on February 3, 1964.

At this time I would offer the subpoena in evidence, your Honor.

Transcript of Hearing on Motion for Contempt

(21)

The Court: Show it to him, please.

(Exhibit is handed to Mr. Kossman.)

The Court: Is there any objection?

Mr. Kossman: No.

The Court: There being no objection, Exhibit 1 is received in evidence.

(Government's Exhibit 1 received in evidence.)

Mr. Lawler: Your Honor, as to the next exhibit, which has already been marked Government's Exhibit 3 for identification, I would like to state at this time that that is the affidavit of United States Attorney Robert M. Morgenthau which makes application under the provisions of Section 1406 to have the defendant, or at that time the witness, granted immunity.

Attached to that affidavit is a letter from the Attorney General of the United States expressing approval of this application.

At this time I would like to call your Honor's attention to certain wording in that letter wherein the Attorney General states that he understands that the testimony of the witness Pappadio is essential and he agrees that it is in the public interest to grant him immunity and to obtain his testimony. It in no way limits the (22) Government to any particular questions, but speaks generally of the testimony of the witness Pappadio.

Mr. Kossman: I have no objection.

The Court: There being no objection, Exhibit 3 is received in evidence.

Transcript of Hearing on Motion for Contempt

(Government's Exhibit 3 received in evidence.)

Mr. Lawler: Your Honor, Government's Exhibit 2 for identification is an order of Judge MacMahon dated August 4, 1964, stating that subject to the provisions of Title 18, Section 1406, Andimo Pappadio is hereby instructed to answer the questions propounded to him before the grand jury. I have paraphrased that, but I will offer the entire order.

The Court: Any objection?

Mr. Kossman: No.

The Court: Received.

(Government's Exhibit 2 for Identification received in evidence.)

Mr. Lawler: Your Honor, the additional exhibits which the Government would offer consist of the transcripts of grand jury testimony. I have spoken to Mr. Kossman and I believe that with respect to all of these transcripts he is willing to make a stipulation that if the (23) grand jury stenographers were called they would testify that this is an accurate transcription of what took place in the grand jury.

Is that correct?

Mr. Kossman: Yes.

The Court: How many sections are involved in this exhibit?

Mr. Lawler: They are all marked as separate exhibits. As I offer them I will read the dates.

The Court: All right.

Mr. Lawler: Exhibit 4 for Identification is the appearance of the witness before the grand jury on February 14, 1964.

Transcript of Hearing on Motion for Contempt

The Court: Received.

(Government's Exhibit 4 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 5 for Identification is the appearance of the witness on April 24, 1964.

The Court: Received.

(Government's Exhibit 5 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 6 for Identification (24) is the appearance of the witness on May 8, 1964.

The Court: Received.

(Government's Exhibit 6 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 7 for Identification is the appearance before Judge MacMahon on August 4, 1964, at which time the witness was granted immunity.

The Court: Received.

(Government's Exhibit 7 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 8 for Identification, your Honor, is the appearance of the witness Pappadio before the grand jury that same day, that afternoon, August 4, 1964.

The Court: Received.

(Government's Exhibit 8 for Identification received in evidence.)

Transcript of Hearing on Motion for Contempt

Mr. Lawler: Government's Exhibit 9 is the appearance of the witness on October 6, 1964.

The Court: Received.

(Government's Exhibit 9 for Identification received in evidence.)

(25)

Mr. Lawler: Government's Exhibit 10 for Identification is the appearance of the witness on October 8, 1964, which includes his appearance before your Honor.

The Court: Received.

(Government's Exhibit 10 for Identification received in evidence.)

Mr. Lawler: Exhibit 11 is the appearance of the witness on October 9, 1964.

The Court: Received.

(Government's Exhibit 11 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 12 is the appearance of the witness before the grand jury on October 13, 1964. This includes the portion of the proceedings when the witness was brought before your Honor and when your Honor instructed him to answer these certain questions which are involved in the contempt proceedings at this time, and a subsequent appearance before the grand jury that same day, including his refusal to answer those questions as directed.

The Court: In other words, when he appeared before me on October 13, 1964, this exhibit shows that I instructed

Transcript of Hearing on Motion for Contempt

him to answer, among others, the questions that are the predicate of this contempt proceeding?

(26)

Mr. Lawler: That is correct, your Honor. It also includes his refusal that same day to answer those questions.

The Court: Received.

(Government's Exhibit 12 for Identification received in evidence.)

Mr. Lawler: Your Honor, at this time I believe that Mr. Kossman will also stipulate that the grand jury that Mr. Pappadio appeared before was a grand jury which was properly impaneled in September of 1963, and which at the time the witness was called to testify before it was investigating alleged violations of the Federal Narcotic laws.

Mr. Kossman: That is correct.

The Court: Is it so stipulated, Mr. Kossman?

Mr. Kossman: That is correct.

Mr. Lawler: Your Honor, that will constitute the Government's direct case.

The Court: Does the Government rest?

Mr. Lawler: The Government rests, your Honor.

Mr. Kossman: Well, if the Court pleases, I move for a judgment of acquittal. Is it your practice to hear argument now?

(27)

The Court: May I ask you this: In the event that I should deny your motion, are you prepared to call witnesses?

Mr. Kossman: Well, we do have our answer in. No, I will not call witnesses. I may wish to introduce one or two exhibits but I will not call any witnesses.

Transcript of Hearing on Motion for Contempt

The Court: All right, I will hear you now in support of your motion. First tell me what the motion is.

Mr. Kossman: The motion is for judgment of acquittal at the end of the Government's case.

Unfortunately, the four questions or the five questions are smothered in, I don't know, perhaps one hundred questions that have been asked.

The Court: In the interests of clarity, Mr. Lawler, will you now read into the record for the guidance of counsel, so that there won't be any question, the four or five questions specifically that are the gravamen of this proceeding.

Mr. Lawler: I will, your Honor.

The Court: So that we will get that on the record beyond any controversy.

Mr. Lawler: I am now reading from Government's (28) Exhibit 12 in evidence.

The Court: Do you have a copy of Exhibit 12 for me?

Mr. Lawler: I do not right now. I just received it. I will have a copy available later.

The Court: Very well, go ahead.

Mr. Lawler: The first question is:

"Q. Mr. Pappadio, who are the attorneys who were present at these meetings?

"A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

"Q. Aside from the meetings which you described, which took place in the street, where else did you meet with Luchese?

"A. I decline to answer under the First, the Fifth and the Sixth Amendments.

"Q. Who else was present at these meetings besides yourself, Luchese and the attorneys?

Transcript of Hearing on Motion for Contempt

"A. I respectfully decline to answer under the First, Fifth and Sixth Amendments.

"Q. All right. How many of such meetings were there?

"A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

(29)

"Q. Where did the meetings take place?

"A. I respectfully decline under the First, Fifth and Sixth Amendment."

Those are the questions involved, your Honor. And may the record also reflect that prior to our coming before your Honor I made this available to Mr. Kossman, who copied down the questions verbatim, I believe.

Mr. Kossman: Except that—

The Court: Just a minute, Mr. Kossman. You have read from what exhibit?

Mr. Lawler: Government's Exhibit 12.

The Court: How many pages does that consist of?

Mr. Lawler: Government's Exhibit 12 is not numbered, your Honor. It is numbered but by the different grand jury stenographers.

The Court: Are these consecutive questions that you read?

Mr. Lawler: The first three questions were consecutive and the next two appear on the next page.

The Court: While Mr. Kossman is talking, will you count the number of pages in that exhibit?

Mr. Lawler: I will, your Honor.

The Court: Go ahead, Mr. Kossman.

(30)

Mr. Kossman: If the Court pleases, while I was shown by the assistant district attorney the transcript—

Transcript of Hearing on Motion for Contempt

The Court: Do you want more time?

Mr. Kossman: No. I mean, I did call his attention to the fact that I think one of these questions was answered somewhere along the line, about how many of such meetings there were. I think he said something about, I don't know, four or five, or so many. So I called his attention to that.

Of course, I had the handicap of not having that transcript—

The Court: Well, do you want an adjournment?

Mr. Kossman: Well, I will take an adjournment so we can have more time to study these things.

The Court: All right. Suppose you argue any matters that you think you are able to argue now without the adjournment.

Mr. Kossman: Now, the next thing is this: I think it is important, of course, that if a man is charged with unlawfully defying the order of the court, it is therefore important in terms of a conflict, when a man has answered, I don't know, forty questions or thirty questions, that your Honor should be apprized and should read those (31) particular questions and those answers going on to wilfullness—

The Court: I shall read all the papers and all the exhibits.

Mr. Kossman: So that would throw light on the individual's—

The Court: You claim that if he answered forty or fifty questions and refuses to answer five questions, that is material and relevant on the issue of wilfullness and contumaciousness to consider that he did answer the other questions.

Transcript of Hearing on Motion for Contempt

Mr. Kossman: Especially, your Honor, these questions. If he had refused to answer a question, am I in the narcotics business—

The Court: I have the point of your argument. I shall read all the evidence in its totality before I make any findings or conclusions. I will not read only the part that the Government is selecting, but I will read everything that you wish to bring out.

Mr. Kossman: I couldn't ask for more.

The Court: All right.

Mr. Kossman: Aside from the other argument that I have presented in the opening, without repeating, I would (32) like to call your Honor's attention to the fact that relevancy is a requirement that has been accepted by the Supreme Court and this court. In *Brown vs. United States*, 359 U. S. 41, at 42, the court stated:

"He was then asked six further questions concededly relevant to the grand jury's inquiry."

In *Ullman vs. United States*—

The Court: There is no doubt about the fact that the questions must be material and relevant to the grand jury's inquiry.

Mr. Kossman: That is correct.

The Court: All right. There is no dispute about that, is there, Mr. Lawler?

Mr. Lawler: No, there is no dispute about that, your Honor.

The Court: You claim that on the face of the record here the questions are not shown to be material and relevant.

Mr. Kossman: That is correct; no showing by the Government. And just to cite the last case, *Pagano*, 171 Fed. Supp. 435, the Court there stated:

Transcript of Hearing on Motion for Contempt

"It is plain from a reading of the questions that all of them were so related and were relevant and (33) pertinent to the grand jury's inquiry as to the illegal narcotics traffic and control."

The Court: There is no dispute as to the law, on that point at least.

Mr. Kossman: Now, the next proposition is this, and I am arguing my motion for judgment of acquittal: On the face of Judge MacMahon's order—and that is part of the Government's case—Judge MacMahon stated, "You are further advised that the grant of immunity," skipping six lines, "except that you will not be exempt from prosecution for perjury."

Now, this doesn't talk of conviction; it talks about prosecution for perjury. Now, therefore, you have a statute that says you get immunity for everything you testify about except from prosecution for perjury.

Now someone has to be—and it isn't going to be the Government's witnesses before the McClellan Committee—and this is part of the record, because if your Honor reads the transcript, you will read—and as I say, the assistant district attorney was most fair: "I want to advise you that there has been testimony before a senate committee."

The Court: Do you have any citations?

Mr. Kossman: Well, you ask me if I have citations. There is—

(34)

The Court: The answer is yes or no.

Mr. Kossman: The answer is, if the Court please—

The Court: Do you want time for a memorandum?

Mr. Kossman: I would appreciate time for a memorandum.

The Court: All right.

Transcript of Hearing on Motion for Contempt

Mr. Kossman: I mean, there is just general law, but specifically I don't have any.

The Court: I want it specifically.

Mr. Kossman: Specifically, I will have to ask for indulgence.

The Court: All right.

Mr. Kossman: My thought is that therefore this is a prosecution for perjury for which he is not given immunity. A prosecution for perjury must follow. I mean, when I say it must follow, when the Government tells you that there has been testimony before a senate committee and statements—

The Court: You mean it is an irresistible conclusion.

Mr. Kossman: I would say it is an irresistible conclusion, and I would say, if your Honor pleases, you would have to take into consideration the fact that the (35) defendant who is faced with the proposition that if he refused to say a word, the most he could have gotten was contempt, yet truthfully—he says truthfully—and your Honor's experience over all these years—

The Court: Leaving out protocol and getting down to the question of your contention, you claim that he was faced with imminent perjury prosecution, and that, therefore, gives him a certain privilege which otherwise would not exist under the usual immunity statutes, including Section 1406?

Mr. Kossman: That is correct.

The Court: I don't want to take up time for further argument on that.

Mr. Kossman: Especially the Sixth Amendment, through the attorney-client relationship; that gives him a right, because these questions involve attorneys. If he is meeting with attorneys and various witnesses in order to show that

Transcript of Hearing on Motion for Contempt

there was perjury committed by Government officials in 1963—when I say Government officials I mean officials who testified—

The Court: You claim that taking all these questions in context, in the aggregate, that by requiring him to answer questions involving or relating to meetings with (36) attorneys and witnesses, that that impinges upon his Sixth Amendment right to counsel?

Mr. Kossman: That is correct.

The Court: And that, therefore, his refusal or declination to answer is justified?

Mr. Kossman: That is correct, as well as the First Amendment.

The Court: All right.

Mr. Kossman: Now I would like to cite another case to your Honor—

The Court: You save that for your memorandum.

Mr. Kossman: All right. Now I would like to point this out—

The Court: I will reserve decision on your motion.

Mr. Kossman: I would like—

The Court: Do you want to put witnesses on?

Mr. Kossman: No.

The Court: Do you want to introduce exhibits?

Mr. Kossman: I will introduce just one exhibit; in view of the fact that the Government, as I say, had stated these things to be so, I was prepared to bring in the transcript of the testimony before the senate committee last September—

(37)

The Court: Wait a minute. You started out by saying that in view of the fact that the Government said this is so. What do you mean by that?

Transcript of Hearing on Motion for Contempt

Mr. Kossman: In other words, in view of the fact that the Government says, "I want to advise you that there has been testimony before a senate committee"—

The Court: You are going too fast; I don't understand you.

Mr. Kossman: The Government before Judge MacMahon—I mean, one of the questions that came out: "I want to advise you that there has been testimony before a senate committee and statements have been made to federal law enforcement agencies," that, therefore, since there is that concession by the Government, I am only asking out of an abundance of caution—

The Court: Do you want them to concede the factual accuracy of that statement?

Mr. Kossman: Yes.

The Court: Mr. Lawler, do you concede the factual accuracy of the statement of fact that is contained in that question?

Mr. Lawler: That there has been testimony to a Government agency?

(38)

The Court: The part that Mr. Kossman just quoted.

Mr. Kossman: And statements were made.

Mr. Lawler: Your Honor, there have been statements made to governmental agencies.

The Court: All right.

Mr. Kossman: The second part—and this will save time—another question directed to the witnesss before the grand jury was:

"At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Massey. Did you attend this meeting?"

Transcript of Hearing on Motion for Contempt

I have attached in our answer the actual transcript of that, but would your Honor ask the Government if they would concede that that is correct?

The Court: Is that statement correct?

Mr. Lawler: There was such testimony.

The Court: It is so stipulated on the record.

Mr. Kossman: Then under those circumstances I would like to offer this as an exhibit, a docket entry, Defendant's Exhibit A.

The Court: Have you shown it to your adversary?
(39)

(Document is handed to Mr. Lawler.)

The Court: Is there any objection?

Mr. Lawler: No objection.

The Court: Received.

(Defendant's Exhibit A received in evidence.)

The Court: Let me look at it, please.

(Exhibit is handed to the Court.)

The Court: At the conclusion of the hearing, gentlemen, will you leave all exhibits with the Clerk so that I can read them.

I notice on Exhibit A, Mr. Kossman, the caption is, "United States vs. Andimo Pappadio," and that on December 1, 1958, the Government moved to sever Pappadio, and that Judge Bicks granted the motion.

I assume that there were other defendants.

Mr. Kossman: Yes.

The Court: Because the caption does not say, "Andimo Pappadio, et al."

Transcript of Hearing on Motion for Contempt

Mr. Kossman: I am sorry, your Honor.

The Court: It only says, "Andimo Pappadio, defendant," but actually there were codefendants.

Mr. Kossman: There were codefendants.

The Court: All right. I want the record to show that. Is that correct, Mr. Lawler?

(40)

Mr. Lawler: That is correct, your Honor.

The Court: All right, go ahead.

Mr. Kossman: Now, the last thing is that I would like to have a concession from the Government that Mr. Pappadio is still a defendant in this particular case and that his trial has not yet been set.

The Court: You mean the case of United States vs. Pappadio, et al., C. 156-157? Is that the case?

Mr. Kossman: That is correct.

Mr. Lawler: Your Honor, the Government will concede that there is still an outstanding indictment against Andimo Pappadio and the case is not presently on the trial calendar.

The Court: And that indictment is the indictment filed July 7, 1959?

Mr. Lawler: That is correct, your Honor.

Mr. Kossman: The only thing left is that I would like to have, in order to write a memorandum for your Honor, a transcript of what took place here.

The Court: Have you ordered it?

Mr. Kossman: Well, I now order it.

The Court: You will have to get out rush copy because we are adjourning until tomorrow morning.

(41) Mr. Kossman: I beg your pardon, tomorrow morning?

Mr. Lawler: Your Honor, might I just say this with respect to the statement I just made concerning the out-

Transcript of Hearing on Motion for Contempt

standing indictment against Andimo Pappadio: with respect to the other defendants who did stand trial, there are issues in that case which are still presently on appeal.

The Court: Would you repeat that, Mr. Lawler?

Mr. Lawler: That case is presently in the appellate courts. The Genovese case was recently affirmed by the Court of Appeals on a certain issue and is now presently before the Supreme Court. I believe a cert has been filed.

The Court: Has certiorari been granted?

Mr. Lawler: Cert has not been granted as yet.

The Court: You mean a petition for certiorari has been filed?

Mr. Lawler: That is my understanding..

Mr. Edelbaum: It is in the process of being filed. The Circuit Court's decision just came down, I believe a week or two ago. Cert has been granted and the case was remanded to the Circuit Court.

The Court: Is that the case where Judge Waterman (42) wrote the opinion?

Mr. Edelbaum: Yes, your Honor.

The Court: All right.

Mr. Kossman: The last thing—I hope it is the last thing, your Honor—that I would like to have is a copy, and previously the Government couldn't give it to me unless you ordered it, a copy of all the grand jury testimony that—

The Court: You mean a copy of the exhibits?

Mr. Kossman: A copy of the exhibits.

Mr. Lawler: We will provide defense counsel with copies of the exhibits.

The Court: All right, so ordered.

Mr. Kossman: But, your Honor—

The Court: When will you give it to counsel, Mr. Lawler?

Transcript of Hearing on Motion for Contempt

Mr. Lawler: This afternoon.

The Court: Instead of adjourning this case until tomorrow morning, under the circumstances, I will adjourn it to Friday morning so as to give counsel the opportunity to read the exhibits and to prepare a memorandum, it now being twelve noon, Wednesday.

Mr. Kossman: Thank you very much.

The Court: We will adjourn the case until (43) nine-thirty Friday morning.

Mr. Kossman: And I would like for the record to renew my motion for judgment of acquittal on the basis of the defendant having rested.

Mr. Edelbaum says that he wishes to say something to your Honor; so maybe we will hold that motion for a judgment of acquittal until Mr. Edelbaum has said something.

Mr. Edelbaum: Your Honor, one further point is that the only order granting this defendant immunity was the order of Judge MacMahon, although there were further proceedings before your Honor.

The Court: Do you claim, Mr. Edelbaum, that there is on file only one order granting immunity?

Mr. Edelbaum: Yes.

The Court: That being the order of Judge MacMahon, Exhibit 2, and that consequently any further proceedings that were had in this matter after the date of Judge MacMahon's order, August 4, 1964, particularly questions not encompassed within Judge MacMahon's order—

Mr. Edelbaum: No, your Honor, that is not my point.

The Court: What is your point?

(44)

Mr. Edelbaum: My point is that in the minutes of the proceeding before Judge MacMahon, which I have before me—I am not sure what the exhibit number is—

Transcript of Hearing on Motion for Contempt

Mr. Lawler: Government's Exhibit 7.

Mr. Edelbaum: In Government's Exhibit 7, would your Honor note on the first page that Judge MacMahon ordered Mr. Lauritano, who is the defendant's attorney of record, out of the courtroom, and that Mr. Lauritano was not allowed to take part in the proceeding.

Now, your Honor, in the Pagano case, United States vs. Pagano, which Mr. Kossman has cited, and all other cases where there have been contempt proceedings after the granting of immunity, the Court in its recitation of the facts, especially very clearly in the Pagano case, stated that at the time of the hearing upon the granting of immunity the witness was represented by his attorney, and his attorney at that time had an opportunity to question legally and factually, and an opportunity to call witnesses if needed, the validity of the grant of immunity, whether or not there was a proper basis, a factual basis, and whether it was done properly.

In all of these cases that have gone up on contempt after immunity has been granted, all of the courts (45) have stated that the witness as of right as represented by his attorney at the proceeding, because the witness must object if the immunity is not sufficient, and he has to have an opportunity to object.

Mr. Lauritano was ordered out of the courtroom and then the immunity was granted. Judge MacMahon's order was the same date. The defendant, through his lawyer, never had the opportunity at that time, on this order upon which the whole contempt is based, to raise the validity of the affidavit of Mr. Morgenthau—to raise the sufficiency of the affidavit of Mr. Morgenthau, and to raise the sufficiency of the letter of the Honorable Attorney General, at that time Mr. Robert F. Kennedy.

Transcript of Hearing on Motion for Contempt

So I say, your Honor, the whole order—

The Court: You have an opportunity now, don't you?

Mr. Edelbaum: Yes, your Honor, but the order itself is invalid because at that time there had to be a full hearing. The hearing was held without counsel. It was, in truth, your Honor, a star chamber proceeding. That is the time the defendant has to object.

We cannot now ask your Honor to overrule a Judge of the same court and have the whole hearing anew.

(46)

This is a standing order. Our only basis is to then later appeal. I say this order is not a valid order. We cannot now object to it, your Honor. I am objecting to it on the ground that he was not represented by an attorney, and I also contest the sufficiency, your Honor, of the affidavit.

Now, furthermore, your Honor, I want to point out one thing that Mr. Kossman stated, to make it a little more clear.

The case in which Mr. Cantellops was a witness was the Aviles case, which was just affirmed by the Circuit Court, and in which the defendant Pappadio was originally a defendant.

In the testimony that we have attached, Mr. Cantellops says under oath that Mr. Pappadio was present at a meeting at Rocco Massey's house.

In the grand jury Mr. Pappadio was asked, "Were you ever at a meeting at Rocco Massey's house?" and he says, "No."

He is also asked, "We have information that you are a member of a group and deal with narcotics and there is such testimony." And he says, "I do not deal with narcotics; I am not a member of the group."

Transcript of Hearing on Motion for Contempt

(47)

The only questions that he refused to answer are not these questions as to which the Government has direct sworn testimony. They are only questions of meetings with his lawyers and with his witnesses, and the contention is that as to these meetings he is privileged not to answer because he is preparing a defense for a very real and possible perjury indictment.

And even though his answers are truthful, there is other sworn testimony directly contra, and he has a right to meet with his lawyers, and the fact that he met these lawyers, the people present, and the people he spoke to, is within his privilege, and is a work product of the defense.

Mr. Lawler: Your Honor, as I understand it, there is going to be an adjournment so that defense counsel can view the exhibits and possibly prepare additional arguments that they might have—

Mr. Kossman: We renew the motion for judgment of acquittal.

The Court: Decision reserved.

Mr. Lawler: And in that case, your Honor, the Government would withhold answering any issues raised until all of the issues have been raised rather than attempt to answer them piecemeal at this time.

(48)

The Court: Let me ask you one or two questions so that defense counsel in preparing the memorandum will direct themselves realistically to the issues.

Do you claim, Mr. Lawler, that the contempt allegedly committed by Pappadio was a contempt in refusing to obey the order of Judge MacMahon?

Mr. Lawler: Your Honor, Judge MacMahon considered the application to grant immunity. He explained to the witness that he had been granted full and complete immunity

Transcript of Hearing on Motion for Contempt

and directed him to answer questions. He explained to the witness that he was required to give testimony and he could no longer refuse to testify on the grounds that his answers might tend to incriminate him.

In addition, certain questions were asked, and when the witness refused to answer, he was brought before your Honor, and you again explained the provisions and directed him specifically to answer.

It would be the Government's position that the witness is in contempt of your Honor's order of October 13th, and also the general order of August 4th of Judge MacMahon in which he was ordered to return to the grand jury and give testimony. I believe that was the wording of the order.

(49)

The Court: So that your contention is that the contempt does not consist only of an alleged violation of Judge MacMahon's order, Exhibit 2, but that it also consists of a violation of a direction that I gave the witness when he appeared before me.

Mr. Lawler: On October 13th, that is correct, your Honor.

The Court: I suppose that it would also be inherent in your argument that since the witness and his lawyers and the witness appeared before me on October 8th and October 13th, that if there was any question as to the validity or clarity or scope of Judge MacMahon's order that it could be presented to me.

Mr. Lawler: That is correct, your Honor, and I believe also—

The Court: In other words, the lawyers were here before me, and even assuming arguendo there were some force to Mr. Edelbaum's argument, were this to be a case, which it is not, based solely on a violation of Judge MacMahon's order, but assuming that, then the subsequent appearance

Transcript of Hearing on Motion for Contempt

of the witness and his lawyers before me completely protected the rights of the witness.

Mr. Lawler: That is correct, your Honor, and they are also present this morning, and if there was any (50) objection to the procedural regularity of the proceeding of August 4th, again they have an opportunity to raise it.

Mr. Kossman: Well, if the Court please—

Mr. Edelbaum: I raised it, your Honor.

The Court: Well, suppose I were to redirect the witness now to go before the grand jury and to answer these four or five questions, and to go through the explanation all over again about Section 1406, would that obviate your contention?

Mr. Lawler: Your Honor, could I just call to your attention that you did exactly that on October 8th.

The Court: I know, but let us assume they are not satisfied with what I said then, do you want me to do it all over again?

Mr. Kossman: No, Judge.

The Court: Because I am prepared to do it if that is going to be the basis of your argument.

Mr. Edelbaum: No, your Honor.

The Court: Do you understand what I am driving at?

Mr. Edelbaum: Yes, your Honor.

The Court: All right. That means then that you are waiving any argument based on the fact that the (51) witness was not told by a Judge of this court to answer those four or five question.

Mr. Edelbaum: No, your Honor, all I wanted was a clarification from the United States Attorney that we are not faced here solely with Judge MacMahon's order, and with that clarification the argument is withdrawn.

The Court: All right.

Transcript of Hearing on Motion for Contempt

Mr. Kossman: I might settle the whole thing, your Honor—

The Court: You withdraw the argument.

Mr. Kossman: Because Judge MacMahon's order was, "I direct you to return to the grand jury and answer each and every one of the questions."

The Court: Mr. Edelbaum, your colleague, has withdrawn that argument.

Mr. Kossman: So therefore that takes care of it.

The Court: Because otherwise I will go through the whole ritual all over again, because I do believe that there are lawyer-like arguments that you have raised in other respects, and if you want me to decide that, I would be glad to decide that on the merits.

Mr. Kossman: That is correct.

The Court: But if it is a question of who told (52) whom what to do and so forth, then I will go through the whole ritual to obviate those arguments.

Mr. Edelbaum: The record has been clarified on which order he is being held.

The Court: All right.

Mr. Kossman: Your Honor told him in my presence.

The Court: All right.

Mr. Kossman: So there is no problem about that.

The Court: I want the briefs submitted to me by five o'clock tomorrow.

Mr. Kossman: Five o'clock tomorrow?

The Court: Because we are meeting Friday at 9:30 a.m.

The proceedings are now adjourned to Friday, October 30, 1964, at 9:30 a.m. in this room.

Will counsel hand up the exhibits to me, and Mr. Kossman will receive a complete set of the exhibits today.

(Adjourned to Friday, October 30, 1964, at 9:30 a.m.)

**Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.**

(53)

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

64 Cr. 897

—————♦—————
[SAME TITLE]
—————♦—————

Before:

HON. WILLIAM B. HERLANDS,

District Judge.

New York, N. Y.,

October 30, 1964,
9:45 a. m.

Appearances:

ROBERT M. MORGENTHAU, Esq.,

United States Attorney,

For the Government;

WILLIAM M. TENDY, Esq. and

ANDREW M. LAWLER, Jr., Esq.,

Assistant United States Attorneys.

LAURITANO, SCHLACTER & SCHNEIDER, Esqs.,

Attorneys for Defendant;

JACOB KOSSMAN, Esq. and

PHILIP R. EDELBAUM, Esq.,

of counsel.

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

(54)

The Clerk: In the matter of Andimo Pappadio.

Mr. Lawler: The Government is ready, your Honor.

The Court: Is there anything to come before the Court, gentlemen, before I read my findings and conclusions?

Mr. Kossman: Did your Honor get a copy of the memorandum that we filed?

The Court: Yes; I not only read your memorandum but I read your cases, all of them.

Mr. Kossman: I wonder if—

The Court: It is a very fine exposition of general principles.

Mr. Kossman: If the Court pleases, I wanted to add the word "not" in the second paragraph on page 8 that has been left out: "Immunity granted do not prevent the right not to disclose."

The Court: The correction will be noted.

Mr. Kossman: There is another one on page 12. Instead of, "There is another absence of wilfulness," it should read, "There is an utter absence of wilfulness."

The Court: That will be noted.

There being nothing else to come before the Court (55) by way of amplification of the record, I will proceed to read into the record my findings and conclusions. After I have finished reading my decision, I will return to the Clerk all of the exhibits in this matter, so that either the Clerk may retain them, with the consent of counsel, or the exhibits will be returned to the United States Attorney, except for the one exhibit that was introduced in behalf of the defendant. In that way the record will be available for further proceedings, if there are any.

The Court having considered the evidence and the documents finds as follows:

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

1. Notice of this hearing was given by an order to show cause signed by me on October 14, 1964, and served on Andimo Pappadio, the witness, and his counsel.

2. A grand jury was duly impaneled for this District in September 1963, and subsequently began an investigation into possible violations of the Federal Narcotic laws, which are referred to in Title 18, United States Code, Section 1406. The grand jury was engaged in this investigation on February 14, 1964, April 24, 1964, and May 8, 1964.

3. Andimo Pappadio, the witness, was duly subpoenaed (56) to appear and testify before this grand jury by a valid subpoena dated February 3, 1964.

4. Pursuant to said subpoena, Andimo Pappadio, the witness, did appear and testify before the grand jury on February 14, April 24, and May 8, 1964.

5. On August 4, 1964, in the presence of Pappadio and the grand jury, oral and written application was made by the United States Attorney pursuant to the provisions of Title 18, United States Code, Section 1406, to have the aforesaid Pappadio instructed to testify.

The written application consisted of an affidavit of the United States Attorney and the written approval of the Attorney General.

This application was made to the Hon. Lloyd F. MacMahon, who, after considering the application, found that the United States Attorney had complied with the provisions of Title 18, United States Code, Section 1406, and was entitled to have the Court instruct the witness to testify and produce evidence before the grand jury.

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

Judge MacMahon explained to Andimo Pappadio, the witness, that full and absolute immunity from federal and state prosecution would be granted to him with respect to all matters concerning which he might be compelled to testify.

6. All steps were properly taken under the provisions of Title 18, United States Code, Section 1406, so that when Judge MacMahon ordered Pappadio to answer the questions Pappadio was then absolutely immune from prosecution, and was not subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might testify.

7. On August 4, 1964, Pappadio returned to the grand jury, but then and there refused to answer the questions.

8. On October 6, 1964, Andimo Pappadio again appeared before the same grand jury and refused to answer the questions.

9. On October 8, 1964, Andimo Pappadio was brought before me for an additional instruction. In the presence of Pappadio's attorney I again explained the immunity provisions of Title 18, United States Code, Section 1406. I again informed Pappadio that he had full and complete immunity as to any testimony which he gave before the grand jury, and then instructed Pappadio to return to the grand jury and give testimony.

10. On October 9, 1964, Pappadio appeared before the same grand jury. On this occasion Pappadio answered (58) certain questions but refused to answer other questions on the basis of the First, Fifth and Sixth Amendments.

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

11. On October 13, 1964, Pappadio returned before the same grand jury. At this time he refused to answer the same questions which he had refused to answer on October 9, 1964.

Thereafter Pappadio was brought before me, and after hearing argument by his attorney, I ordered Pappadio to return to the grand jury and answer the questions which he had previously refused to answer.

That same afternoon Pappadio appeared before the grand jury and wilfully refused to answer the questions as directed by me.

12. Among the questions that the witness so refused to answer were the following questions which are the predicate of the present contempt proceeding:

“Q. Mr. Pappadio, who are the attorneys who were present at these meetings?

“A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

“Q. Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

(59)

“A. I decline to answer under the First, the Fifth and the Sixth Amendment.

“Q. Who else was present at these meetings besides yourself, Lucchese and the attorneys?

“A. I respectfully decline to answer under the First, Fifth and Sixth Amendment.

* * * * *

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

"Q. All right; how many of such meetings were there?

"A. I respectfully decline to answer on the ground of the First, the Fifth and Sixth Amendment.

* * * * *

"Q. Where did the meetings take place?

"A. I respectfully decline under the First, the Fifth and the Sixth Amendment."

The aforesaid questions which Pappadio refused to answer on October 13, 1964, were material and pertinent to the grand jury investigation then being conducted. Pappadio's refusal to answer these questions obstructed and hindered the grand jury in its investigation.

13. During the hearing conducted before me on October 28 and October 30, 1964, the United States submitted evidence and full opportunity was given to the (60) witness, Andimo Pappadio, to present evidence. During this hearing Pappadio was at all times represented by counsel.

14. The Court finds that the witness is guilty of a criminal contempt as charged.

Conclusions of law:

1. The Court concludes that the witness is guilty of a criminal contempt as charged.

2. Andimo Pappadio is adjudged guilty of criminal contempt for his wilfull disobedience on October 13, 1964, of a lawful order of the Court. Andimo Pappadio, in refusing to answer questions before the grand jury on October 13,

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

1964, wilfully violated the order of Judge MacMahon of August 4, 1964, and my order of October 13, 1964.

3. The Court hereby fixes the punishment as two years. An order to that effect shall be entered forthwith in accordance with Rule 42 (b) of the Federal Rules of Criminal Procedure.

The foregoing portion of my decision consists of numbered findings and conclusions. I should now like to discuss some of the points. This portion of my decision represents an expression of opinion with regard to only a few of the points. Those points that I (61) regard as transparently without merit will not be discussed or adverted to.

It is incorrect to argue, as the witness now does, that the burden of proof would be upon him to show the affirmative fact that the Government has used or is using his testimony in a prosecution, including the prosecution of a now pending indictment against the witness. Should the Government try the witness under the pending indictment, the burden would be on the Government to prove, clearly and convincingly, that all of its proof is derived from sources completely independent of the witness's grand jury testimony, and any clues or leads derived from such testimony.

The burden would be upon the Government to establish the negative fact that none of its evidence is the fruit of the protected tree of the witness's immunized testimony. Such is the teaching of the cases on this point and in analogous situations. *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 103 (1964) (concurring opinion of Mr. Justice White); *Lapides v. United States*, 215 F. 2d 253, 261 n. 10 (2d Cir. 1954) (dissenting opinion) (no disagreement as to this point); cf. *United States v. Tane*, 329 F. 2d 848, 853 (2d

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

Cir. 1954); *United States v. Agueci*, 310 F. 2d (62) 817, 834 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963); *United States v. Paroutian*, 299 F. 2d 486, 489 (2d Cir. 1962); *United States v. Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).

The memorandum submitted in behalf of the witness in opposition to the order to show cause does not discuss a single question involved herein. Instead, it is a generalized argument that side-steps the specific matters posed.

Under Title 18 U.S.C. Section 1406, the immunity statute, the Government has the right to obtain truthful testimony from the witness. That is the objective of the provision that excludes the witness's perjury, if any, from the immunizing effect of the statute.

The immunity statute does not create an opportunity for a witness to effect an illusory exchange of real immunity in return for false testimony. There must be a bargain equivalent whereby the Government obtains the truth in exchange for its granting immunity.

That is the purpose of the concluding provisions in Section 1406, which read:

"But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on (63) account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

Virtually all immunity statutes contain the same or similar provisions with regard to perjury that may be committed by a witness.

The argument advanced in behalf of the witness with regard to a possible perjury prosecution, if accepted, would completely frustrate and nullify the purpose underlying the perjury provision contained in Section 1406 to which I have just alluded.

An order shall be entered in accordance with the directions of the Court hereinabove set forth. So ordered.

Mr. Lawler: May I say something at this time?

(64)

The Court: Yes.

Mr. Lawler: Your Honor, since the primary purpose of this investigation is to obtain testimony or to obtain evidence so that indictments might be filed or voted upon, might I suggest to your Honor that you include a clause in the sentence that if Mr. Pappadio does answer the questions as directed, that a further application may be made to your Honor to reconsider this sentence, so that we will have some coercive effect on Mr. Pappadio.

The Court: Yes, I shall adopt the proposal presented by Assistant United States Attorney Lawler, and my decision shall be deemed to include a provision reading in the form and manner proposed by Mr. Lawler.

There is an exception in favor of the witness.

Mr. Kossman: If the Court pleases, No. 1, I would like to call your Honor's attention to the fact that on October 1, 1964, a case in the District Court of Columbia, Rollerson vs. United States of America, stated, pages 16-17 of the slip opinion, which I hand up to your Honor:

"Since Rollerson's contempt conviction, a majority of

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

the Supreme Court has indicated in United States vs. Barnett that the punishment which (65) may be imposed after a non-jury contempt conviction is limited to that provided for petit offenses."

Now, your Honor is familiar with the fact that four Justices of the Supreme Court—

The Court: I referred to that the other day.

Mr. Kossman: Yes.

The Court: And I am aware of the Barnett decision. I have studied and restudied the majority and minority opinions. I have studied Judge Wyatt's opinion in a recent case. I am aware of the views expressed by our Court of Appeals in the Harris case. And I believe that on the facts of this case the sentence that I have imposed complies with the spirit, the reasoning and the rationale of all of these cases.

Mr. Kossman: Well, the courts differ, that whatever term, that the sentence could not be more than six months, and if this conviction would be affirmed—

The Court: Every opinion, as Mr. Justice Frankfurter has so often stated, must be read in the factual context and procedural background of a case. You could find quotations to support almost any proposition, unless you read what the court says in the context, factually and procedurally, of the particular case.

(66)

I have attempted to comply fully with the teachings of the cases, and in all humility, a virtue to be exemplified by judges no less than lawyers, I have expressed my views in the opinion dictated on the record.

Mr. Kossman: The Court has stated that there are lawyer-like arguments, and we believe there are; therefore,

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

there is a substantial question, and we would like bail fixed pending appeal.

The Court: An application is now being made for bail pending appeal. I shall hear the Government.

Mr. Lawler: Your Honor, the Government would oppose the application for bail pending appeal and ask that the defendant be remanded at this time.

The main basis for the Government's argument would be that your Honor has found that Mr. Pappadio in his refusal to testify has obstructed and hindered the grand jury in its investigation.

Your Honor has also included a clause in the sentence whereby if Mr. Pappadio were to answer these questions then the sentence might be reconsidered by your Honor.

Since we have this coercive effect being imposed by the sentence that your Honor has just imposed upon the (67) defendant, Andimo Pappadio, it is the position of the Government that this coercive effect should go into being as soon as possible. In other words, whatever coercive effect this sentence might have in convincing the witness to answer the questions as directed, that the interests of the grand jury and the public interest are best served by having this coercive effect take effect as soon as possible.

While Mr. Pappadio has a perfect right to appeal to the Court of Appeals, and if it is affirmed, to the Supreme Court, this grand jury investigation is continuing, and it is presently being hampered and obstructed by Mr. Pappadio's refusal.

I think, your Honor, that this sentence should be imposed to start immediately.

Mr. Kossman: May I answer that? If your Honor please, I think the facts of this case are not so. I mean

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

Mr. Pappadio has answered numerous questions, forty questions or fifty questions, and it comes down to four questions. There is a substantial question of law involved. Your Honor indicated that there were two other—

The Court: I did not indicate that there was a substantial question involved.

(68)

Mr. Kossman: Well, you said lawyer-like questions—I am sorry; perhaps I read more into that—

The Court: You did.

Mr. Kossman: But it certainly is not frivolous, if the Court please.

Mr. Lawler: Your Honor—

The Court: Let Mr. Kossman get through, because he is making a record now. He knows that the precise word that he is using, the word "frivolous," is a word of art in connection with applications for bail pending appeal, so we will let Mr. Kossman go ahead with his application.

Mr. Kossman: I don't want your Honor to feel that I am talking just to make a record.

The Court: No; I have the highest respect for you, Mr. Kossman, and for your erudition—

Mr. Kossman: I appreciate that.

The Court: And for that reason I want to give you every opportunity to say whatever you have to say.

Mr. Kossman: I understand that there were two previous witnesses who refused to testify, who did not answer a single question, and I think bail was allowed. I know about the last one, the one that is up on appeal, I think it is Judge Wyatt—what is the name of that?

(69)

Mr. Lawler: The Castaldi case, your Honor—

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

Mr. Kossman: The Castaldi case.

Mr. Lawler: In the second case, the Shillitani case, the witness was remanded by Judge MacMahon, and thereafter bail pending appeal was twice denied by the Circuit Court and eventually denied by the Supreme Court of the United States.

Mr. Kossman: But he is out.

Mr. Lawler: No, he is presently still in jail.

The Court: The Court of Appeals, as I recall, granted bail in one situation and denied bail in another.

Mr. Lawler: That is correct.

The Court: Mr. Lawler, what, so far as you can ascertain, are the distinguishing circumstances to explain the denial of bail in one instance and the granting of bail in the other?

Mr. Lawler: Your Honor, in the Castaldi case the bail was granted in the District Court by Judge Wyatt. At the time that we argued the question of bail apparently Judge Wyatt was of the opinion originally that Castaldi was entitled to bail as of right. We argued that it was discretionary with the judge, and I believe Judge Wyatt eventually agreed with us, but set bail in the amount, I think, of \$50,000.

(70)

The second time Judge MacMahon, being completely within the discretion of the trial court, remanded, and the Circuit Court stated on two separate occasions that they would not interfere with that judgment, and the Supreme Court stated that they would not interference with the judgment of the Circuit Court.

Mr. Kossman: May I say something, your Honor? In the case where bail was denied, the individual was on parole,

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

I have been advised, and was remanded for violation of parole.

Mr. Lawler: That is not correct.

Mr. Kossman: Was he on parole?

Mr. Lawler: He was on parole; he was not remanded for violation of parole.

Mr. Kossman: He was on parole?

Mr. Lawler: Yes.

Mr. Kossman: Now here we have an individual who is out on bail on a narcotic charge since 1958. He has faithfully come here every time he was subpoenaed in the last six months or seven months.

Of course, as we have asked, we would like to have a trial on that 1958 thing, but of course—

The Court: You are now getting away from—

Mr. Kossman: But he is not an individual who (71) might run away. That problem does not exist. He is a business man.

The Court: Does he have a record?

Mr. Kossman: I beg your pardon?

The Court: Does he have a record?

Mr. Kossman: I don't believe he has, except for one conviction for which he received a pardon thirty years ago.

Mr. Lawler: He has a narcotics conviction, your Honor, for which he did receive a pardon.

Mr. Kossman: Thirty years ago, when he was, I think, eighteen years old or nineteen years old. So, therefore, in law he has no record. He is a businessman; he employs people. And as I say, if your Honor please, this case—and I know that comparisons are traditionally invidious—this case, compared to the one where bail was granted, where the individual refused to answer every question, "Are you

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

in narcotics, and this and that." Here is an individual who has answered many, many questions.

So I think, under those circumstances, he stands in a better position, or should stand in a better position, even as far as the Government is concerned.

Mr. Lawler: Your Honor, as I stated, we are primarily (72) interested in obtaining testimony. I think it is fair to say that while the defendant Pappadio is not confined, which is the coercive effect, we are not going to receive the answers, and the grand jury is not going to receive the answers to these questions.

Mr. Kossman: Well, your Honor—

Mr. Lawler: I might also say that the life of this grand jury only extends six months from this past September. They are well within their second year and the life of the grand jury—

The Court: Mr. Lawler, the purpose of bail is limited to assurance of the appearance of the witness in a proceeding. Bail may not be used for collateral purposes, such as punishment or pressure, and to that extent I am constrained to disagree with your contention.

Rule 46 of the Federal Rules of Criminal Procedure, (a) (2), provides:

"Bail may be allowed pending appeal or certiorari, unless it appears that the appeal is frivolous or taken for delay."

The question that I have to decide in connection with this application for bail, within the framework of this case, is whether it appears to me reasonably that the (73) appeal is frivolous or taken for delay.

I have studied the exhibits in this case very closely, and I

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

am, of course, familiar with the proceedings had before Judge MacMahon and before me. I have listened very closely to the arguments of counsel, and it appears to me, and I so state on the record, that the appeal would be frivolous and would be taken for delay.

Under those circumstances, I shall deny the application for bail.

Mr. Edelbaum: Your Honor, would you consider paroling the defendant in my custody pending an application to the Circuit Court for bail to be made immediately?

The Court: When you say "immediately," you mean what?

Mr. Edelbaum: I will make the application today, as soon as the Circuit Court will hear me.

Mr. Lawler: Your Honor, we could not very well object to that.

The Court: What is that?

Mr. Lawler: We will consent to it, if the application is going to be made today.

The Court: If the application is made today I will release the witness in the custody of Mr. Kossman (74) and Mr. Edelbaum. If counsel should ascertain, after going up to the Clerk's office of the Court of Appeals, that such an application cannot be presented today, notwithstanding the exercise of due diligence by counsel, but can be held next week, I should like to be so advised, and I will then entertain a new application to determine whether or not the witness should be continued in the custody of counsel until such time as counsel can make the application to the Court of Appeals.

Mr. Lawler: Your Honor, when we use the term "application," are you speaking in terms of the argument today, because we had the situation once where the application

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

was made and the hearing was set down or the argument was set down for a week later.

The Court: That is why my present decision relates only to today, and then in the light of whatever may eventuate, I will then review the situation and decide what to do then.

As the record stands now, Pappadio is released in the custody of Mr. Kossman and Mr. Edelbaum only for today, and at the expiration of today, meaning 4:00 p.m. today, he no longer will be in custody of counsel but will have to be taken into custody by the Marshal, provided no earlier application is made to me, in which case (75) redefine the terms of his custody and release.

Mr. Kossman: We are going to file a notice of appeal forthwith, and then we will make our application for bail, so there is no delay from now on to our filing the application.

The Court: I would direct counsel to return before me by one o'clock today in this room.

Mr. Kossman: Yes, your Honor.

The Court: To advise me what the status of the matter is in the Court of Appeals vis-a-vis the date of a hearing, etc.

I am now returning to the Clerk all of the exhibits in this matter.

Mr. Kossman, do you want Exhibit A?

Mr. Kossman: Well, I don't know what the procedure here is. When they ask a record to be printed, do we not print everything that is in the Clerk's office?

The Court: No, they don't print everything. I will return all exhibits to the Clerk, and then counsel may decide amongst themselves what they want to do, but until there is a contrary agreement by counsel, the Clerk is directed to retain custody of the exhibits. And that is particularly a practicable procedure because if the (76) matter is going to the Court of Appeals, the file here would have to be trans-

*Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.*

mitted to the Court of Appeals, and it may be expedient to keep all the exhibits in one place.

Mr. Kossman: I will state definitely that I do not care to have Exhibit A returned.

The Court: Will counsel check the file with the Clerk to be sure that all the exhibits are here, because in many cases sometimes an exhibit goes astray, and then there is a very sharp controversy as to who had the exhibit the last time. So out of an abundance of caution I am directing counsel and the Clerk to check to see that all the exhibits involved in this proceeding are in the Clerk's custody.

Mr. Kossman: And, of course, what will be added will be your Honor's opinion and findings of fact when we go up.

The Court: Yes, naturally, that is part of the proceedings in the case.

I am also returning to the Clerk the stenographic transcript of the proceedings yesterday, which the Clerk will file as the record of yesterday's proceedings.

There are three typographical corrections on page 28, which I understand have been called to the attention of counsel.

(77)

The Court: The word "those" is changed to "these." The word "matters" is changed to "meetings." The word "discussed" is changed to "described."

Is that correct?

Mr. Kossman: That is correct.

The Court: And the official reporter is directed to make those corrections and initial the margin, so that the corrections have the official imprimatur of the official reporter.

I think that ties up the package.
